

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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COMMUNICATIONS SECTION

In the Matter of

Petition of the SBC Companies for)
Forbearance from Regulation as a Dominant Carrier) CC Dkt 98-227
for High Capacity Dedicated Transport)
Services in Specified MSAs)

REPLY COMMENTS OF HYPERION TELECOMMUNICATIONS, INC.

Hyperion Telecommunications, Inc. ("Hyperion"), by its undersigned attorneys, respectfully submits the following reply comments on the above-referenced Petition filed by the SBC Companies ("SBC") requesting forbearance from regulation as dominant carriers in their provision of high capacity transport services in 14 Metropolitan Statistical Areas ("MSAs") in their service areas.¹ Hyperion filed initial comments in this proceeding.

The filed comments only further illustrate that the Commission should deny SBC's Petition. There is substantial agreement among the commenters that SBC's request would be more appropriately considered in the Commission's *Access Charge Reform Proceeding*.² Moreover, even if the Commission decides to address SBC's Petition in a separate docket, the vast majority of

¹ *Petition of SBC Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Fourteen Metropolitan Service Areas*, CC Docket No. 98-227 (December 8, 1998).

² *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, usage of the Public Switched Network by Information Service and Internet Access Providers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, CC Docket Nos. 96-262, 94-1, 91-213, 96-263, 11 FCC Rcd. 21354 (1996).

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commenters agree that SBC has failed to meet the forbearance standard required by Section 10(c) and has failed to meet the standard for pricing flexibility.

I. The Commenters Agree that SBC's Request is More Appropriately Considered in the Access Charge Reform Proceeding

In its initial comments, Hyperion noted that the SBC Petition involved the very issues the Commission was considering in the *Access Charge Reform Proceeding*.³ Indeed, the Commission had just completed a notice cycle to gather updated comments on issues such as pricing flexibility. Moreover, Hyperion also noted that it would be particularly inappropriate to consider SBC's request outside of the *Access Charge Reform Proceeding*, since granting SBC's request would essentially eviscerate the phased approach to pricing flexibility envisioned by the Commission.⁴

Numerous commenters support Hyperion's position that a separate proceeding to consider SBC's Petition would be inappropriate.⁵ For instance, as Time Warner stated, "the issues raised in the instant petition are far more appropriately addressed in the context of the comprehensive Access Charge proceeding."⁶ Even one of the RBOCs recognized that the *Access Charge Reform Proceeding* will address the very issues SBC raised in its Petition. Ameritech contends in its comments that the Commission should adopt its suggested proposal for pricing flexibility, indicating

³ Hyperion Comments, at 2.

⁴ *Id.* at 2-3.

⁵ KMC Comments, at 4-6; ALTS Comments, at 3-4; MCI WorldCom Opposition, at 3-5; Time Warner Opposition, at 22-23.

⁶ Time Warner Opposition, at 22.

that the Commission should resolve SBC's Petition within the context of the Commission's determination of pricing flexibility rules.⁷

Although Hyperion disagrees that the Commission should adopt Ameritech's pricing flexibility proposal, Ameritech correctly recognizes that the Commission already has a docket open that would more appropriately address these issues. SBC's request is not an isolated one, but is targeted to the very core of the Commission's pricing flexibility rules. Until the Commission formulates the rules it will use in examining whether RBOCs are entitled to pricing flexibility, it is premature to resolve SBC's Petition.

II. Commenters Agree that SBC's Petition Fails to Prove that it Lacks Market Power in the 14 MSAs Indicated

The commenters agree that the SBC Petition misstates its degree of market power in terms of supply and demand elasticities. Contrary to SBC's unsupported allegations of increased competition in those 14 MSAs, other commenters provided more concrete evidence of the true status of competition in these markets. The comments demonstrate that the competitive environment in the high capacity market neither allows carriers to easily take business away from SBC nor allows customers to easily change service providers. For instance, MCI WorldCom explains in great detail how the facilities of competitors within the 14 MSAs at issue cover only a limited number of high capacity routes.⁸ Accordingly, any competition would have to be limited to an extremely small geographical area within each of the 14 MSAs. Moreover, SBC's long term agreements, high termination liability and excessive nonrecurring charges make it extremely expensive for a customer

⁷ See Ameritech Comments, at 2.

⁸ MCI WorldCom Opposition, at 7.

to switch suppliers.⁹ Thus, even if alternative facilities were available, SBC has utilized its monopoly control to ensure that customers will not be able to switch to an alternative provider without an economic consequence.

Moreover, as demonstrated by Hyperion and other commenters in the proceeding, the *Quality Strategies Study* provides little help in ascertaining the actual market shares in each of the MSAs studied and contains many fundamental flaws. Specifically, the Study's measurement of the market share for high capacity services is inadequate. As explained by numerous commenters, this measurement is flawed for a number of reasons. First, the Study fails to explain the methodology used to reach its conclusion. The Study appears to use DS-1 equivalents as the basis for measuring market estimates for high capacity services.¹⁰ However, using DS-1 equivalents would most likely overstate SBC's market share loss. As noted by AT&T and MCI WorldCom, under these assumptions, the loss of a DS-3 is considered the same as the loss of 28 DS-1s, while the price for the DS-3 is only two or three times greater.¹¹ The result is to make SBC's market loss appear much greater than it is in reality.

Hyperion agrees with several commenters' suggestions that revenues should be included in evaluating market share.¹² Although the Study discounts revenue as an important factor in

⁹ MCI WorldCom Opposition, at 10-12; AT&T Opposition, at 14.

¹⁰ See, e.g., U S West Comments, at 3.

¹¹ AT&T Opposition, at 5; MCI WorldCom Opposition, at 14 and n.22.

¹² See MCI WorldCom Opposition, at 14; Sprint Opposition, at 9.

measuring market shares, the Commission has considered revenue at least as important as equivalent circuits.¹³

Hyperion agrees with commenters that argue that revenue figures would permit a comparison of paying customers to the SBC ILECs and their competitors, which would provide a more complete picture of market share.

Moreover, Hyperion agrees with other commenters that the market share estimate also fails to distinguish between end user and carrier customers of high capacity services, providing another indication that SBC's market share loss is overstated. As several commenters noted, this factor is critical because not only does SBC still control the majority of the transport for high capacity services for carriers, SBC also controls virtually 100% of the transport to end users, or the "last mile" into the customer premises.¹⁴

III. The SBC Petition Does Not Meet the Standards for Forbearance

As Hyperion stated in its initial comments, Section 10(c) of the Telecommunications Act requires the Commission to make several findings prior to granting forbearance of any regulation.¹⁵ Specifically, the Commission must find that enforcement of the regulation is no longer necessary to protect the public interest. As the commenters demonstrate, enforcement of the dominant carrier rules continues to be necessary to ensure that SBC's high capacity rates and practices are just, reasonable and not discriminatory.

¹³ MCI WorldCom Opposition at 14; *see generally* Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271 (1995).

¹⁴ KMC Comments, at 3; Sprint Opposition, at 8; AT&T Opposition, at 6-7.

¹⁵ Hyperion Comments, at 6.

Hyperion agrees with other commenters that the sweeping forbearance requested by SBC would enable it to thwart competition in the provision of high capacity services. Within MSAs SBC could reduce prices to deter competition, but raise prices in other portions of the MSA where competitors are not yet able to provide service.¹⁶ SBC also could charge rates that are not just and reasonable on the routes lacking any competitive alternatives. The Commission's rate averaging requirements and price cap rules continue to be necessary to prevent such behavior. Moreover, the tariff rules' advance notice and cost support requirements would permit SBC customers and the Commission to monitor and challenge potentially unlawful rates before they become effective.¹⁷ In short, continued enforcement of the dominant carrier rules at this time, furthers the public interest.

¹⁶ See Opposition of CompTel, at 7.

¹⁷ Opposition of MCI WorldCom, at 17.

IV. CONCLUSION

For the above stated reasons, and the reasons outlined in its initial comments, Hyperion urges the Commission to deny SBC's request for forbearance from dominant carrier regulation for the provision of high capacity services in the 14 MSAs specified.

Respectfully submitted,



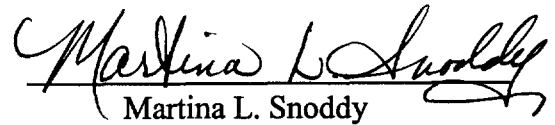
Patrick J. Donovan
Pamela S. Arluk
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

Counsel for Hyperion Telecommunications,
Inc.

Dated: February 11, 1999

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments was sent by hand delivery or by U.S. first class mail, postage prepaid, on this 11th day of February, 1999 to the attached list of parties.


Martina L. Snoddy

Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-A325
Washington, D.C. 20554

Lawrence Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20054

Jane Jackson
Chief, Competitive Pricing Division
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, D.C. 20554

Joel Taubenblatt, Esq.
Common Carrier Bureau
Federal Communications Commission
Room 513A
1919 M Street, N.W.
Washington, D.C. 20554

Robert Lynch, Esq.
Michael Zpevak, Esq.
Thomas Pajda, Esq.
One Bell Plaza, Room 3003
Dallas, Texas 75202

Mark Evans, Esq.
Geoffrey Klineberg, Esq.
Kellogg, Huber, Hansen, Todd
and Evans
Suite 1000 West
1301 K Street, N.W.
Washington, D.C. 20005

International Transcription Service
1231 20th Street, N.W.
Washington, D.C. 20036

Alan Buzacott
Henry G. Hultquist
MCI WorldCom, Inc.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Michael S. Pabian
Counsel for Ameritech
Room 4H82
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025

Lawrence E. Sarjeant
Linda L. Kent
Keith Townsend
John W. Hunter
United States Telephone Association
1401 H Street, N.W., Suite 600
Washington, D.C. 20005

James T. Hannon
Jeffrey A. Brueggeman
US West Communications, Inc.
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036

Genevieve Morelli
Executive Vice President
and General Counsel
Competitive Telecommunications Association
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036

Robert J. Aamoth
Andrea D. Pruitt
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Fifth Floor
Washington, D.C. 20036

Emily M. Williams
Association for Local
Telecommunications Services
888 17th Street, N.W., Suite 900
Washington, D.C. 20036

Brian Conboy
Thomas Jones
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Mark C. Rosenblum
Peter Jacoby
Dina Mack
AT&T Corporation
295 North Maple Avenue
Room 3245H1
Basking Ridge, NJ 07920

Leon M. Kestenbaum
James W. Hedlund
Sprint Corporation
1850 M Street, N.W.
Washington, D.C. 20036

Jeffrey L. Sheldon
General Counsel
UTC
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036

Rodney L. Joyce
Shook, Hardy & Bacon, L.L.P.
1850 K Street, N.W.
Suite 900
Washington, D.C. 20006-2244

Patrick J. Donovan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

Barry Pineless
Regulatory Counsel
GST Telecom Inc.
4001 Main Street
Vancouver, WA 98663

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006

Susan M. Eid
Richard A. Karre
MediaOne Group, Inc.
1919 Pennsylvania Avenue, N.W.
Suite 610
Washington, D.C. 20006